IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD G. STANTON	:	**CIVIL ACTION**
	:	
v.	:	
	:	
THE PRUDENTIAL INSURANCE COMPANY, PRUDENTIAL INSURANCE AND FINANCIAL SERVICES, PRUCO SECURITIES, JOSEPH MAURIO and JOSEPH GEBBIA	:	**NO. 98-4989**

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J. **April 20, 1999**

Plaintiff Richard Stanton ("Stanton"), filing this action against defendants Prudential Insurance Company ("Prudential"), Prudential Insurance and Financial Services ("PIFS"), Pruco Securities Corporation ("Pruco"), Joseph Maurio ("Maurio"), and Joseph Gebbia ("Gebbia"),[1] stated claims under the Americans with Disabilities Act ("ADA"), the Age Discrimination in Employment Act ("ADEA"), and pendent state claims under both the New Jersey Law Against Discrimination ("NJLAD") and the Pennsylvania Human Resources Act ("PHRA"), intentional infliction of emotional distress, negligent infliction of emotional distress, fraudulent misrepresentation, civil conspiracy, negligence, and defamation. Defendants filed a Motion to Dismiss or Stay Action Pending Arbitration of Stanton's claims. Because all Stanton's claims must be arbitrated, the claims will be dismissed.

BACKGROUND

Prudential and its wholly-owned subsidiaries, PIFS and

[1]Stanton's complaint also named John Doe, Jane Roe, and ABC Company as defendants; as he alleges no facts implicating unnamed parties, these John Doe defendants will be dismissed.

Pruco, sell financial products, including insurance, mutual funds, and brokerage services. (Compl. ¶¶ 3-5). Defendant Maurio is a manager in Prudential's West Trenton Office, defendant Gebbia is a Vice President of Prudential in its principal office in Pennsylvania. (Id. ¶¶ 7-8). Prudential is registered with the National Association of Securities Dealers ("NASD"). (Id. ¶ 6).

Stanton, an agent selling products registered with the Securities and Exchange Commission ("SEC"), had to register with the NASD by signing a Uniform Application for Securities Industry Registration or Transfer ("Form U-4"). When Stanton signed a Form U-4 on August 21, 1991, he agreed to "arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations indicated in Item 10 as may be amended from time to time." (Defs.' Br. Supp. Mot. Dismiss at 3). Item 10 listed Prudential and Pruco. (Id.) The NASD By-Laws and Code of Arbitration Procedure in effect at all relevant times required arbitration of "any dispute, claim, or controversy arising out of or in connection with the business of any member of the Association, or arising out of the employment or termination of employment of associated person(s) with any member . . . ." (Id. at 4).[2]

[2]Effective January 1, 1999, the NASD has changed its arbitration rules; it no longer requires arbitration of statutory discrimination claims. "This means that such claims may be filed in the appropriate court, if the employee chooses to do so and is

In 1986, Stanton had been diagnosed with a seizure disorder. (Id. at 11). In 1991, when Stanton was hired as a Sales Manager in Prudential's West Trenton, New Jersey office, he advised his new employer of his condition. (Id. ¶¶ 12, 13). Stanton was demoted from Sales Manager to Sales Agent in 1993 (id. ¶ 14); he then became a member of the collective bargaining unit. The Collective Bargaining Agreement, most recently amended in 1995, provided an internal grievance procedure with subsequent arbitration of claims regarding "the termination of the services and Agreement of any regular Prudential Representative." (Pl.'s Br. Opp'n Mot. Dismiss Ex. B).

In 1995, Stanton was placed on probation for low sales production. (Id. ¶ 15). On October 14, 1996, Stanton suffered a seizure in his manager Maurio's presence and was placed on temporary disability. (Id. ¶¶ 24, 26). Stanton returned to work approximately one month later and claims that Prudential and Maurio treated him in a discriminatory and defamatory manner, including filing false reports against him with the state of New Jersey and the NASD to establish a pretext for his termination. (Id. ¶¶ 27, 30, 32-35, 46-48). Stanton was suspended shortly

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not under an enforceable predispute obligation to arbitrate the dispute." 63 Fed. Reg. 339422, 35300 (1998). At least one court has applied an NASD amendment retroactively, see Kidd v. Equitable Life Assurance Soc'y, 32 F.3d 516, 518 (11th Cir. 1994)(applying the 1993 NASD amendment requiring arbitration of employment disputes to an action filed after the amendment became effective), but the NASD rules expressly made the 1999 amendment non-retroactive: "NASD Regulation states that the rule change will apply to claims filed on or after the effective date of the rule change." 63 Fed. Reg. at 35301.

after his return to work, during which time stress triggered another period of disability. (Id. ¶¶ 36, 43). Stanton was terminated in March, 1997. (Id. ¶ 44).

Stanton claims he filed a grievance but that defendants refused to participate in the grievance process. (Pl.'s Br. Opp'n Mot. Dismiss at 3 & n.2). Stanton then filed federal claims for discrimination based on disability and age, pendent state claims under the NJLAD and PHRA, as well as state common law claims. Defendants filed a motion to dismiss or stay litigation pending the outcome of arbitration.

DISCUSSION

I. Standard of Review

In considering a motion to dismiss under Rule 12(b)(6), the court "must take all the well pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 665-66 (3d Cir. 1988) (citations omitted), cert. denied, 489 U.S. 1065 (1989); see Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). The court must decide whether "relief could be granted on any set of facts which could be proved." Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988). A motion to dismiss may be granted only

"if appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

II. Arbitration of Stanton's Claims

The court must first determine if there is a valid agreement to arbitrate and, if so, whether the claims fall within the scope of the agreement. See PaineWebber, Inc. v. Hartmann, 921 F.2d 507, 511 (3d Cir. 1990). Defendants have moved to compel arbitration required by the Form U-4 Stanton signed, but Stanton contends that the Form U-4 arbitration agreement does not apply to his claims because he was covered by a Collective Bargaining Agreement ("CBA") superseding the Form U-4 and he cannot be compelled to arbitrate federal statutory discrimination claims.[3]

A. Existence of a Valid Arbitration Agreement

Form U-4 arbitration agreements are covered by the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq. See Gilmer, 500 U.S. at 25-26 & n.2. The FAA embodies a "liberal federal policy

[3]Stanton also argues that defendants waived any objections to judicial determination of Stanton's claims by agreeing not to challenge personal jurisdiction or venue in consideration of an extension of time to respond to the complaint. (Pl.'s Br. Opp'n Mot. Dismiss at 5-6). In waiving their objections to personal jurisdiction and venue, the defendants did not waive other grounds for dismissal; they have not waived the defense that Stanton's claims must be arbitrated. See PaineWebber, Inc. v. Faragalli, 61 F.3d 1063, 1068-69 (3d Cir. 1995)("[W]aiver will normally be found only where the demand for arbitration came long after the suit commenced and when both parties had engaged in extensive discovery.")(citation omitted). In this action, defendants have availed themselves of the judicial forum to enforce their rights under the arbitration agreement, a right under §§ 3 and 4 of the Federal Arbitration Act. Defendants did not waive their right to arbitration in doing so.

favoring arbitration agreements." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983); "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Id. at 24-25.

In Gilmer, the Supreme Court upheld the arbitration of an ADEA claim under a Form U-4 substantively identical to the one Stanton signed. See Gilmer, 500 U.S. at 35. Agreements to arbitrate claims under both the Securities Act of 1933, see Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484-85 (1989), and the Securities Exchange Act of 1934, see Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 238 (1987) have also been enforced.

Arbitration of other statutory claims has been consistently compelled under Form U-4 arbitration agreements. See, e.g., Seus v. John Nuveen & Co., Inc., 146 F.3d 175, 182 (3d Cir. 1998)(Form U-4 requires arbitration of claims under ADEA and Title VII), cert. denied, --U.S.--, 199 S. Ct. 1028 (1999); Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., --F.3d--, 1999 WL 80964, *9 (1st Cir. Feb. 24, 1999)(same); Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698, 700 (11th Cir. 1992)(Title VII claims); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 312 (6th Cir. 1991)(Title VII claim); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229, 230 (5th Cir. 1991) (Title VII claim; arbitration required on Supreme Court remand in light of Gilmer). But see Renteria v. Prudential Ins. Co., 113 F.3d 1104, 1106 (9th Cir. 1997)(refusing to compel arbitration of Title VII claims

under Form U-4 because employee not on specific notice that sexual discrimination claims had to be arbitrated). The arbitration agreement in the Form U-4 signed by Stanton is valid and enforceable.

Stanton argues that the Form U-4 arbitration agreement no longer applies to him because it was superseded by the Collective Bargaining Agreement ("CBA") in effect when Stanton was demoted from Sales Manager to Sales Agent.[4] But after his demotion, Stanton was still involved in the sale of registered financial products, still required registration with the NASD, and was still bound by the terms of the NASD Code, including its arbitration provisions. The subsequent CBA may have given Stanton an additional right to a grievance procedure, but it did not nullify the arbitration agreement in the Form U-4 he signed.

The Form U-4 was an agreement between Stanton and the NASD, the CBA an agreement between Stanton and his employer; changes in Stanton's agreement with his employer did not affect his agreement with the NASD. See First Liberty Inv. Group v. Nicholsberg, 145 F.3d 647, 650 (3d Cir 1998)("When a party seeking to avoid arbitration contends that the clause providing for arbitration has been superseded by some other agreement, the

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[4]If the CBA, rather than the Form U-4, applies to Stanton, he is correct that he could not be compelled to arbitrate his federal statutory discrimination claims because the CBA did not state clearly that these types of claims must be arbitrated. See Wright v. Universal Maritime Serv. Corp., --U.S. --, 119 S. Ct. 391, 396 (1998)("[A]ny CBA requirement to arbitrate [a statutory claim] must be particularly clear"). This case will be discussed further in Section II.B. infra.

presumptions favoring arbitrability must be negated expressly or by clear implication.")(internal quotations omitted); Stone v. Pennsylvania Merchant Group, Ltd., 949 F. Supp. 316, 322 n.4 (E.D. Pa. 1996)(second employment contract did not affect Form U-4 terms); In re Prudential Ins. Co. of Am. Sales Practices Litigation, 924 F. Supp. 627, 635 (D.N.J. 1996)(superseding employment contract after promotion did not affect Form U-4 arbitration agreement), rev'd on other grounds, 133 F.3d 225 (3d Cir. 1998); O'Donnell v. First Investors Corp., 872 F. Supp. 1274, 1277 (S.D.N.Y. 1995)(same); see also Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 n.2 (1991)("[T]he arbitration clause at issue is in [plaintiff's] securities registration application [U-4], which is a contract with the securities exchanges, not with [defendant]."). The arbitration agreement in the Form U-4 signed by Stanton on his first day of employment was not superseded by the subsequent CBA; it continued to bind Stanton and governs all covered claims.

B. Arbitration of Plaintiff's Statutory Discrimination Claims

Stanton, relying on the recent Supreme Court decision in Wright v. Universal Maritime Serv. Corp., --U.S. --, 119 S. Ct. 391 (1998), contends that he cannot be compelled to arbitrate an ADA claim. (Pl.'s Br. Opp'n Mot. Dismiss at 1). In Wright, the Court held that, without express mention of statutory

discrimination claims, a general arbitration clause in a collective bargaining agreement could not compel a covered employee to submit his ADA claim to arbitration. See Wright, 119 S. Ct. at 395-96. In reaching this decision, the Wright Court recognized "some tension" in its earlier arbitration decisions. Wright, 119 S. Ct. at 395.

In Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974), the Court had held that an employee's participation in compulsory arbitration under a CBA did not foreclose his subsequently filing a Title VII claim in a judicial forum. Then, in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 27 (1991), the Court upheld compulsory arbitration of an ADEA claim under a Form U-4 arbitration agreement. The Gilmer Court distinguished Gardner-Denver because it "did not involve the issue of enforceability of an agreement to arbitrate statutory claims . . . . arbitration in [Gardner-Denver] occurred in the context of a collective-bargaining agreement . . . [and it was] not decided under the FAA which . . . reflects a liberal federal policy favoring arbitration agreements." Gilmer, 500 U.S. at 35 (internal quotations omitted).

The Wright Court declined either to resolve the tension between its holdings in Gilmer and Gardner-Denver or to overrule either case. Because the Court found the generally-worded CBA at issue was not an express waiver of statutory claims, the Court did not find it necessary to decide whether an express waiver would be enforceable, the question left open in Gardner-Denver.

See Wright, 119 S. Ct. at 395.[5]

The validity of the arbitration provision in this action is governed by Gilmer rather than by Wright. The arbitration provision defendants seek to compel is contained in a Form U-4, individually signed by Stanton, as in Gilmer, not a collective bargaining agreement as in Wright. See Seus, 146 F.3d at 182 (applying Gilmer to determine the arbitrability of a Title VII claim under a Form U-4). The Wright Court noted that the "clear and unmistakable" standard articulated in Gardner-Denver was inapplicable to the U-4 form in Gilmer because Gilmer involved "an individual's waiver of his own rights, rather than a union's waiver of the rights of represented employees." The arbitration provision was accepted by Stanton when he executed the Form U-4, and that agreement is entitled to a presumption of arbitrability.[6]

Gilmer's holding only addressed arbitration of an ADEA

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[5]The Wright Court questioned, without resolving, "whether or not Gardner-Denver's seemingly absolute prohibition of union waiver of employees' federal forum rights survives Gilmer." Wright, 119 S. Ct. at 396; the Gilmer Court acknowledged that part of the Court's reasoning in Gardner-Denver, the "mistrust of the arbitral process," had been "undermined" by its more recent decisions. Gilmer, 500 U.S. at 34 n.5 (internal quotations omitted). Whether Gardner-Denver has been undermined does not affect this decision, because Gilmer remains authoritative, even after Wright, and is controlling here.

[6]A signatory to an arbitration agreement may resist arbitration on grounds of fraud or coercion in inducing the arbitration agreement, but "[t]here is no indication that [Stanton], an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause in his registration application." Gilmer, 500 U.S. at 33.

claim,[7] but it is equally applicable to Stanton's ADA claim absent evidence that "Congress intended to preclude a waiver of a judicial forum for [ADA] claims." Gilmer, 500 U.S. at 26. The Americans with Disabilities Act states: "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including ... arbitration, is encouraged to resolve disputes arising under this chapter." 42 U.S.C. § 12212. The plain language of the statute evidences congressional intent to encourage arbitration of ADA claims, not to shield them from arbitration.

Numerous appellate court decisions, finding no congressional intent to foreclose arbitration of ADA claims, uphold ADA arbitration. See, e.g., Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141, 150-51 (1st Cir. 1998)(applying arbitration provision in enrollment agreement between private school and parents to an ADA claim); Miller v. Public Storage Management, Inc., 121 F.3d 215, 218 (5th Cir. 1997)(ADA claim subject to arbitration under employment contract; the explicit language of the ADA "persuasively demonstrates Congress did not intend to exclude the ADA from the scope of the FAA"); Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 882 (4th Cir. 1996)(affirming arbitration of ADA and Title VII claims under CBA arbitration provision).

C. Arbitration of Plaintiff's State Claims

[7]For this reason, Gilmer squarely requires arbitration of Stanton's ADEA claim.

Stanton asserts two state statutory claims for discrimination and six state common law claims against defendants.[8] These claims must all be arbitrated.

According to the terms of the Form U-4, all claims must be arbitrated if they "aris[e] out of the employment or termination of employment of associated person(s) with any member." The state statutory claims substantively mirror the federal claims and are arbitrable.

The relevant inquiry as to the state tort claims is whether they "involve significant aspects of the employment relationship or whether resolution of the tort claims will require an evaluation of either the employee's or the employer's performance in the course of the employment relationship." Stone v. Pennsylvania Merchant Group, Ltd., 949 F. Supp. 316, 324 (E.D. Pa. 1996). All Stanton's state tort claims (intentional infliction of emotional distress, negligent infliction of emotional distress, fraudulent misrepresentation, civil conspiracy, negligence, and defamation) arise directly from the circumstances leading to the termination of Stanton's employment. See id. (collecting cases). Under the terms of the Form U-4, all the state tort claims must be submitted to arbitration. "If all the claims involved in the action are arbitrable, a court may dismiss the action instead of staying it." Seus, 146 F.3d at 179. All Stanton's claims are arbitrable, so Stanton's claims

[8]Stanton only challenged arbitration of the ADA, but it is appropriate to address arbitrability of all claims asserted.

will be dismissed rather than stayed pending the outcome of arbitration.

CONCLUSION

When Stanton signed the Form U-4 at the commencement of his employment he agreed to arbitrate any employment-related disputes involving the defendants, including any disputes arising from termination of that employment. Stanton's knowing acceptance of this mandatory arbitration provision, as well as the strong presumption in favor of the enforcement of arbitration agreements, requires Stanton to submit his claims against defendants to arbitration in accordance with the Form U-4. The Collective Bargaining Agreement, covering a bargaining unit he joined after the Form U-4 was signed, did not supersede the arbitration clause in the U-4 agreement. Stanton agreed to arbitrate all claims against defendants relating to the termination of his employment. There is no legal exception for the arbitration of federal statutory discrimination claims if the employee has made an individual decision agreeing to arbitrate all disputes arising out of his employment. All Stanton's pendent state claims relate to termination of his employment, so they must be submitted to arbitration also. Dismissal, rather than stay, of the action is appropriate.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD G. STANTON	:	**CIVIL ACTION**
	:	
v.	:	
	:	
THE PRUDENTIAL INSURANCE COMPANY,	:	
PRUDENTIAL INSURANCE AND FINANCIAL	:	
SERVICES, PRUCO SECURITIES,	:	
JOSEPH MAURIO and JOSEPH GEBBIA	:	**NO. 98-4989**

ORDER

AND NOW this 20th day of April, 1999, upon consideration of Defendants' Motion to Dismiss or Stay Action Pending Arbitration, Plaintiff's Response in Opposition, Defendants' Reply, and Plaintiff's Surreply, and in accordance with the attached Memorandum, it is **ORDERED** that the Motion to Dismiss or Stay Action Pending Arbitration is **GRANTED**. This action is **DISMISSED** as to all John Doe defendants for failure to state any allegations or claims against them and **DISMISSED** as to all named defendants because all claims against them must be arbitrated.

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Norma L. Shapiro, S.J.